REA LAW JOURNAL

DEPARTMENT OF AGRICULTURE RURAL ELECTRIFICATION ADMINISTRATION

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RECENT CASES

Easements - Effect of vagueness in the description of an easement to build power lines across land

Defendant light and power company held an easement entitling it to build power lines on certain described areas of the burdened premises and to cut down trees endangering or interfering with the efficiency of the power lines. Defendant built power lines on its right of way and later it cut down three trees which it alleged interfered with the efficiency of the power lines and were so close to them as to create a source of danger. Plaintiff sued to recover the value of the trees. On special issues submitted to the jury, the jury found that the trees did not interfere or endanger the power lines, and judgment was given for plaintiff. Defendant appealed. Held, judgment reversed. Texas Power & Light Co. v. Casey, 138 S.W.(2d) 594 (Tex. 1940).

The plaintiff contended that the easement under which the trees were cut was void for lack of definite description of the course and width of the right of way. The court ruled that the claim of vagueness was without merit since the easement sufficiently described the right of way, and, if it did not, then defendant had the right to select a right of way of such course and width as was reasonably necessary for the purpose of building and maintaining its transmission lines.

In addition, there were several procedural grounds necessitating reversal, such as the failure to allow defendant proper cross-examination as to the measure of damages, the placing of the burden of proof on defendant to prove that the trees did interfere with the power lines, rather than on plaintiff to prove they did not interfere, the failure of plaintiff to frame an issue for the jury on the question of negligence of defendant, since plaintiff could recover only if defendant was negligent in the use of its easement.

Franchises - Construction of grant as limited to life of grantee or perpetual

Defendant owned and operated an electric generating plant in the plaintiff city, and in the conduct of its business placed its poles, wires and mains in and on the city streets and alleyways, claiming the right to do so by virtue of an ordinance passed by plaintiff in 1887. The ordinance granted to defendant's predecessor in interest, a corporation chartered for fifty years, and to "its successors or assigns", the right to use the city streets and alleys as defendant did in fact use them.

Plaintiff contended that the ordinance, as a matter of construction, granted the rights and privileges enumerated therein, for only fifty years, the life of the original grantee, and that if it purported to make a perpetual grant it was invalid under the Nebraska statutes in force in 1887. Plaintiff appealed from a judgment for defendant. Held, judgment affirmed. City of York, Neb. v. Iowa-Nebraska Light & Power Co., 109 Fed. (2d) 683 (C.C.A. 8, 1940).

The ordinance, as a matter of construction granted the rights and privileges

therein specified for perpetuity and not for fifty years, since it included the grantee's successors and assigns. The Supreme Court of Nebraska had interpreted similar ordinances as making a perpetual grant, and the federal court was bound to follow the State Supreme Court's interpretation of a state statute or ordinance. The city, in 1887, had the power to make a perpetual grant of the franchise in question under the state statutes then in force, giving the city the control and supervision of the streets and the power to provide for and regulate the lighting of the streets.

The plaintiff's right to use the streets and alleys of the city, so the court held, is a property right in the nature of an easement, and "although the exercise of that right is subject to the police power of the state, the grant cannot be taken away arbitrarily". Hence, plaintiff may not be ousted from the city streets.

Jurisdiction of Public Service Commission over sale of electrical appliances by public utility

The New York Public Service Commission held a hearing and made a determination favorable to the Consolidated Edison Co. involving the question whether the practices of the Company in connection with the sale of electrical appliances, especially refrigerators, were fair and reasonable. The City Ice and Fuel Co., apparently a competitor injured by the practices of the Consolidated Edison, petitioned the court to review the determination of the Commission, and the Consolidated Edison intervened. The latter company urged that the Commission had no jurisdiction over questions concerning the sale of appliances; that even if it had such jurisdiction the Commission was not empowered to hold a hearing; that even if it were so empowered, its determination was not reviewable by the courts. Held, that the Commission had jurisdiction, that it was empowered to hold the hearing, and that its determination was reviewable by the courts. In re City Ice & Fuel Co., 18 N.Y. Supp. 588 (Sup. Ct. N. Y. 1940).

The court held that the Commission has supervision over questions concerning the sale of electrical appliances manufactured or sold by public utilities, even though by statute the utility is given the right to manufacture and sell appliances, since "this right, because of the essence of the utility itself, must be subject to the supervision of the Public Service Commission in order that this right, by its exercise, may not result in discriminatory or preferential rates". Further, the court ruled that the Public Service Law empowered the Commission to hold hearings. In meeting the objection that the courts had no jurisdiction to review, the court held that the provision of the Civil Practice Act limiting judicial review of the hearings of a Commission to those held "pursuant to statutory direction" was met in this case, since, although the hearing of the Commission was pursuant to a statute permitting and allowing, rather than directing the hearing, it was still within the spirit and meaning of the statutory words.

Liability of REA Cooperative for Tort

Plaintiff brought an action for damages for personal injuries received while riding in an automobile driven by A, agent and employee of the defendant electric cooperative corporation. A, while acting as employee and agent of the cooperative took the plaintiff on official business for a drive to a point on plaintiff's farm for the purpose of examining and discussing the location of poles on the farm. The allegation of the plaintiff was that A drove negligently, as a result of which the automobile hit a stump and injured the plaintiff. The action is both against A as an individual and the defendant cooperative. Held, that A as an individual was liable but the defendant cooperative is an organization in the nature of a corporation holding its funds in trust and therefore could not be liable in tort. Arkansas Valley Cooperative Rural Electric Co. & Wilson v. Elkins (Ark. Sup. Ct. June 10, 1940).

The holding of the court that an electric cooperative corporation organized under a Cooperative Corporation Act and

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A review of that portion of the law important and interesting to attorneys working in the field of rural electrification.

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borrowing money from the Rural Electrification Administration is not liable for tort is extremely interesting. The court takes judicial notice of the creation of the Rural Electrification Administration, pointing out that under the Act "great sums of money were set aside with which to make loans to local cooperative agencies throughout the nation to enable rural residents to secure the conveniences afforded by electric service, a privilege that had heretofore been denied to them on account of the prohibitive cost." The court then went on to discuss the nature of the defendant cooperative;

The cooperative is a non-profit organization engaged in rendering service to members only. Its purposes are extremely limited and it may not engage in general business. In such a case the court states: "We think the funds created by non-profit sharing corporations, such as in the instant case, are in the nature of trust funds." The court also points out that the Arkansas statute under which such cooperatives are organized does not permit business gains or profits from which judgments in tort might be satisfied. Consequently, the court concludes that the entity created, i.e., the Rural Electric Cooperative Corporation, is an organization performing a trust function for its membership and it may not be held liable in tort.

/Editorial Note/

A study of this decision and the law of the several states on the subject has led the Editors of the Law Journal to the conclusion that the doctrine stated in the instant case will be confined to the State of Arkansas and will not become general law.

Negligence - Duty of Company supplying electric energy to provide fuses in motor owned by the one purchasing the energy

Defendant electric power company entered into a contract to furnish electric current to plaintiff for the operation of a cotton gin. As a result of the absence of a fuse on the motor wires one of the electric motors was burned out. The plaintiff brings this action, alleging negligence on the part of the defendant in its failure to provide fuses. The lower court granted a motion for a nonsuit. Held, affirmed. Williamson v. South Carolina Electric & Gas Co., 7 S.E. (2d) 516 (S.C. 1940).

The court states that the contract in question for the furnishing of electric energy was exceedingly simple and contained no reference to fuses. Consequently, the burden of proof rested upon the plaintiff to show that the power company was under a duty to protect the equipment in question. No proof of this fact was given. Furthermore, the court points out, the record was silent as to why the plaintiff did not place fuses in the motor for its own protection. In view of the facts demonstrated there was no proof of a duty upon the defendant to protect the plaintiff's motor by installing fuses and without proof of the duty there could be no negligence.

Negligence - Duties with respect to stringing of wires adjacent to telephone lines

Plaintiff filed a suit against three individuals, a telephone company, and a power company for judgment for $2,000, on account of averred negligence. The negligence alleged arose as a result of the following facts: The three individual defendants cut a tree growing on the land of one of them. It stood about 14 or 15 feet off the 50 foot right of way of the defendant power company and about 40 feet from the nearest wire which was charged with electricity of 33,000 volts. The long distance telephone lines of the defendant telephone company crossed the electric line near this point. The negligence alleged on the part of the electric company and the telephone company was that they constructed their lines to cross one another adjacent to standing timber and without insulation. Furthermore, that they permitted their lines to cross each other in such a fashion as to permit the lines to touch each other. The testimony showed that the tree was cut so as to cause it to fall parallel with the high tension lines. However, a vine had connected to one of the trees and this caused the tree to swing to one side and strike a line carrying high voltage current. The line broke, and as it fell to the ground it came in contact with the telephone line. As a result of the contact the plaintiff, employed at the switchboard in the office of the local telephone company, was severely shocked and injured. The lower court rendered a judgment upon a verdict for the plaintiff. Held, reversed and the case dismissed. Southwestern Gas & Electric Co. v. Deshazo, 138 S.W. (2d) 397 (Ark. 1940).

The court indicated that the allegation of the plaintiff as to the negligence of the power company in constructing its line too close to the telephone line would be tested in the light of the National Electric Safety Code adopted by the Department of Public Utilities. On this point the court states:

"While these regulations may be regarded as official, and as furnishing, under ordinary circumstances, reasonable margins of safety in the conduct of those who construct and maintain such electric systems, it may perhaps be said that such regulations prescribe only the minimum of care that should be tolerated under such circumstances and conditions, but certainly if such minimum of care be taken and exercised in such construction work, then one who asserts defects such as to make the construction or maintenance dangerous, must assume the burden of proving the particular acts or conditions that constitute the negligence complained of. The proof in this case does not show any facts in regard to faulty or negligent construction. For instance, in regard to trees, Rule 281, paragraph A, was offered in evidence. It provides that: 'Where trees exist near supply line conductors they shall be trimmed, if practicable, so that neither the movement of the trees nor the swinging or increased sagging of conductors in wind or ice storms or at high temperatures will bring about contact between the conductors and the trees. Exception. For the lower voltage conductors, where trimming is difficult, the conductor may be protected against abrasion and against grounding through the tree by interposing between it and the tree a sufficiently nonabsorptive and substantial insulating material or device. B. At wire crossings and railroad crossings as far as practicable, from overhanging or decayed trees which might fall into the line.'

"We find no provision in these rules, or any part thereof, that the owner of the high tension lines should anticipate every possible condition whereby a sound, green tree, approximately 40 feet away, might be so broken down or storm-swept as to make it necessary to go upon the land of another and cut trees, or move the line already constructed, should a tree on land adjacent thereto, though belonging to another, grow to a sufficient height that it might at some time be blown across such line. The proof in this case is not that there

was any sagging condition of any line. There was not any overhanging tree. There was no decayed tree, nor is there a requirement in law that those who construct and maintain wire circuits should anticipate the falling of any sound, green tree, or that it might be cut by the owner, or, if cut, that a vine growing in the top might cause it to fall so as to break some wire and cause damage. The witnesses tell us also that such wires, or lines, where they cross shall be at least 6 feet apart according to the rules of National Code of Safety, and those who are experienced in such construction say under ordinary conditions such allowances could not be criticized as improper. In this cause, however, the facts are undisputed that the lines were 12 feet apart, that is to say that the electric lines carrying the high voltage were 12 feet higher than the telephone lines which crossed below. The proof also shows that these high tension lines were properly built above the smaller or lighter lines of the telephone company, so if 6 feet be a reasonable clearance, twice that distance furnished greater protection."

The other important point considered by the court concerned the argument on the part of the plaintiff that the judgment should be sustained on the doctrine of res ipsa loquitur. The court denies the application of this principle to the facts in the instant case, stating:

"We think it may be announced that the only instance in which the rule of res ipsa loquitur applies must be that the act or thing causing the injury must have been under the exclusive control and management of the one charged and it will not apply except when the occurrence must be such as in the ordinary course of events it does not happen when due care has been exercised. In such instances it is said a rebuttable presumption arises that there was negligence on account of which plaintiff may recover, unless the defendant, or one charged offers evidence to meet and offset or rebut the presumption. But in all cases where all the facts attending the injury are disclosed by the evidence and nothing is left to inference, certainly no presumption can be indulged. In this case there are several things that were not found within the control or management of either of the defendants. The first of these is that three farmers who cut the tree acted independently. The tree and the manner of its falling was certainly not within any power or authority of the defendants to control or direct in any way. There is no evidence that any one had any knowledge that the top of this tree that was cut was tied or connected by a vine to another tree. There is no showing that the electric company had any control over or management or direction in any sense of the long distance telephone line, nor is there any connection of the telephone company to the electric line. Certainly the electric company had no control over the office of the telephone company or the grounding of any of the wires. It did not even have the right or power to make an inspection, and if there had been a defect, to correct or repair the same."

ADMINISTRATIVE INTERPRETATIONS

Utah Contractor's License

The Attorney General of Utah in an opinion rendered recently ruled that a foreign corporation did not have to obtain a Utah contractor's license in order to submit a bid for work to be performed in Utah.

Section 79-5A-1, Utah Rev. Stat. Supp. 1939, requires contractors to secure a license before engaging in business of acting in the capacity of a contractor in Utah. This section provides:

"It shall be unlawful for any person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act in the capacity of a contractor within this State without having a license therefor as herein provided, unless such person, firm, copartnership, corporation, association or other organization is particularly exempted as provided in this Act."

A foreign corporation asked the Attorney General six questions which he answered as follows:

"1. Must we obtain a license as a qualified contractor to bid on public work or private work in your State? No. Must this be done before bidding? No.

"2. If so, what is the name of the licensing body, and what is their full address? The Department of Registration is the bureau that licenses contractors.

"3. Must we qualify as a foreign corporation before submitting bids in order that we may be fully protected as to all of our rights under the laws of your State? No.

"4. (a) Is the presentation of a bid construed as doing business in your State? No.

(b) Is the acceptance of such a bid construed as doing business in your State? No, but steps for qualifying must be immediately initiated thereafter.

"5. Can we submit bid and qualify as a foreign corporation after the award has been made to us? Yes. If so, does this involve payment of a fine for non-compliance as a foreign corporation because not qualifying at the time the award was made? No.

"6. Can we submit a bid, obtain a contract, and then qualify as a foreign corporation in order to fully protect our rights without incurring any fines for doing business in your State without a license? Yes."

Thus a contractor incorporated outside the State need not obtain a Utah contractor's license before submitting a bid on a project to be constructed within the State of Utah.

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A-249 Issuance of bonds by Wis. municipality power district without approval of electorate

A-252 Power of Oklahoma municipality to sell public land to a cooperative

A-266 Extent of medical and surgical aid provided for under Workmen's Compensation Laws in the United States

A-284 Maryland cooperative serving Virginia

LEGAL MEMORANDA RECENTLY RECEIVED

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A-250 Execution of revenue bonds by the utility districts without consent of electorate (Regions 1 and 4)

A-251 Necessity of execution of a trust instrument by the trustee

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A-254 Issuance of revenue bonds by power districts without approval of the electorate (Regions 2 and 3)

A-255 Issuance of revenue bonds by power districts without approval of the electorate (Region 7)

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A-269 Legal effect of amendments to bylaws not adopted in the prescribed manner

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A-271 Statutory restrictions on contractual activities of government employees

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A-278 Effect of a deed granted to an organized corporation and delivered to a promoter of the corporation

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A-280 Power of a Maine borrower to extend its lines into Canada

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